

# **HIV, ETHICS AND HUMAN RIGHTS**

## **Review of legislation of Papua New Guinea**

**Joint project of UNDP Pacific Centre, Regional Rights  
Resource Team SPC and UNAIDS**

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## ***Introduction and methodology***

This review used the principles set out in the *International Guidelines on HIV/AIDS and Human Rights* to assess the legal environment for the response to HIV in Papua New Guinea. The *International Guidelines on HIV/AIDS and Human Rights* were published jointly by the Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 1998. Following the Third International Consultation on HIV/AIDS and Human Rights, held by those same agencies in July 2002, a revised *Guideline 6* dealing with access to prevention, treatment, care and support was published. A consolidated version of the *Guidelines*, incorporating the revised *Guideline 6*, was published in 2006.<sup>1</sup>

To assist parliamentarians and other officials to enact and reform laws in response to the HIV epidemic, in 1999 UNAIDS and the Inter-Parliamentary Union published a *Handbook for Legislators on HIV/AIDS, Law and Human Rights*.<sup>2</sup> The *Handbook for Legislators* takes the principles established by the *International Guidelines*, and provides concrete examples of steps taken by various governments and legislatures to implement them. The *Handbook for Legislators* also provides a series of 10 “checklists” with which to assess whether different areas of law are compliant with the *International Guidelines*. The checklists address the following topics:

1. Public health law.
2. Criminal law.
3. Prisons/correctional laws.
4. Anti-discrimination legislation.
5. Equality of legal status of vulnerable populations.
6. Privacy/confidentiality laws.
7. Employment law.
8. Therapeutic goods, consumer protection laws.
9. Ethical human research.
10. Association, information, codes of practice.

Information about the legal system of each country reviewed is organised according to the framework provided by the checklists, and the content of each checklist. In addition to the matters dealt with by the *International Guidelines* and the *Handbook for Legislators*, Checklist 5 considers the issue of abortion.

This review was conducted using all materials available at the time. Although every effort was made to obtain the most recent and up-to-date information on the state of the law, no guarantee can be made as to accuracy or completeness. In addition to analysing the information collected to assess the degree of consistency between the relevant country’s legal system and the principles contained in the *International Guidelines*, we have also identified where further information is needed in order to make a more

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<sup>1</sup> See <http://www.ohchr.org/english/issues/hiv/guidelines.htm> .

<sup>2</sup> UNAIDS/IPU. Geneva, 1999.

complete assessment. We welcome any additional information that can be provided to improve and update this review.

## ***Human rights principles***

The principles of Human Rights relevant to HIV include—

- The right to non-discrimination, equal protection and equality before the law;
- The right to life;
- The right to the highest attainable standard of physical and mental health;
- The right to liberty and security of the person;
- The right to freedom of movement;
- The right to seek and enjoy asylum;
- The right to privacy;
- The right to freedom of opinion and expression and the right to freely receive and impart information;
- The right to freedom of association;
- The right to work;
- The right to marry and found a family;
- The right to equal access to education;
- The right to an adequate standard of living;
- The right to social security, assistance and welfare;
- The right to share in scientific advancement and its benefits;
- The right to participate in public and cultural life;
- The right to be free from torture and cruel, inhuman or degrading treatments or punishment.

Particular attention is paid to the rights of women and children.<sup>3</sup>

## ***Background<sup>4</sup>***

PNG has a generalised HIV epidemic, with adult prevalence of 1.6% in December 2006. Estimates made in 2007 projected adult prevalence of 2.6% and 98,000 people living with HIV by December 2009.<sup>5</sup> Prevalence is rising more quickly in rural areas than urban areas. Concentrations of HIV infection exist in Port Moresby and other towns, along major transport routes, and around rural enterprises such as mines and plantations where there are risk settings, such as active markets for commercial sex.

Unprotected heterosexual intercourse is the main mode of HIV transmission. Unprotected paid sex is a central factor. In one survey, 60%–70% of truck drivers and military personnel, and 33% of port workers said they had bought sex in the previous year.

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<sup>3</sup> See *Consolidated Guidelines* paras 102-103.

<sup>4</sup> UNAIDS (2008) *Report on the Global AIDS Epidemic* Geneva

<sup>5</sup> PNG National AIDS Council (2007) *2007 Estimation Report on the HIV Epidemic in Papua New Guinea*

About 40% of the adult population are infected with at least one sexually transmitted infection (STI). Unprotected sex between men is also a factor in the epidemic. When surveyed, 12% of young men said they had had sex with men, and condom use was rare. Injecting drug use is not thought to be a factor in the PNG epidemic.

Factors increasing vulnerability include —

- exceptionally high prevalence of STIs that amplify the risk of HIV transmission;
- low rates of condom use;
- patterns of male sexual behaviour including concurrent multiple sexual partners, and a high incidence of sexual assault;
- limited employment opportunities, illiteracy and urban migration, which contribute to growing poverty;
- rapid social change, especially as it affects gender relations, increases the vulnerability of women, weakens social structures, and exposes young people to HIV risk;
- poor access to health services and the poor health status of the population which increases their susceptibility to HIV infection, including the prevalence of TB and malaria and poor antenatal care;
- poor infrastructure which is deteriorating even further, poor or no health care facilities in most parts of the country;
- poor status of women — women and girls are the victims of coerced sex, family or sexual violence, and polygyny and brideprice encourage the view that women are property;
- Some faith based groups with fundamentalist followings publicising anti-condom, punitive messages;
- low life expectancy and low illiteracy rates of women, increased poverty obliging women to turn to transactional sex.

## ***Legal system***<sup>6</sup>

The legal system is based on the Anglo-Australian legal system and adopts the common law of England as received at time of Independence in 1975. Much of the statutory law at the time was based on the legislation of Australia (principally Queensland e.g. the Criminal Code) although extensive legislative reform has been ongoing since then. The first superior court of record is the National Court (single judge) with appeals to the Supreme Court (3 judges or more). The Supreme Court has original jurisdiction in constitutional matters. The District Court is the court of limited jurisdiction, with various grades of magistrates. Village Courts are empowered to hear and determine a limited range of matters according to custom.

The Bougainville Province has been granted autonomous status, and has its own Constitution, which makes provision for the establishment of a Bougainville judicial system, consisting of a High Court which is a court of record and unlimited jurisdiction,

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<sup>6</sup> Information on court and legal systems derived from Pacific Islands Legal Information Institute [www.paclii.org](http://www.paclii.org); additional information from RRRT.

including jurisdiction over the national Criminal Code, with a Chief Justice and other Judges, who may also be National Court Judges; and other courts. The national Supreme Court is the appellate court, and the National Court of PNG may review the exercise of judicial authority of the Bougainville High Court.

### ***International obligations***

PNG is a member of the United Nations. It is a State party to the International Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. PNG is a signatory to the Millennium Development Declaration and the UNGASS Declaration of Commitment on HIV/AIDS 2001.

Section 117(7) of the *Constitution* provides that ‘no treaty forms part of the municipal law of Papua New Guinea unless, and then only to the extent that, it is given the status of municipal law by or under a Constitutional Law or an Act of the Parliament’. In determining whether a law is Constitutional on the grounds of being ‘reasonably justified in a democratic society’, regard may be had to international human rights law including:

- the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and
- the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms;
- judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms (Section 39(3)).

### ***HIV policy framework***

The *National Strategic Plan (NSP) for HIV/AIDS 2006-2010* (NSP) identifies seven focal areas: treatment, counselling, care and support; education and prevention; epidemiology and surveillance; social and behavioural change research; leadership, partnership and coordination; family and community; and monitoring and evaluation. The guiding principles of the NSP are —

- The rights of all PNG citizens, as enshrined in the national Constitution, must be the basis for the delivery of all services relating to HIV and AIDS.
- Decisions on all aspects of the national response must be based on evidence.
- Transparency and accountability must be the basis for all aspects of the national response to HIV and AIDS.
- Respect must be given to the culture of PNG in the implementation of HIV/AIDS related projects and programmes.

PNG’s *Medium Term Development Strategy 2005-2010* includes HIV and AIDS as one of the 6 expenditure priorities of the Government. *The National Gender Policy and Plan on HIV and AIDS 2006-2010* has been developed and launched as a companion document to the NSP to guide efforts to integrate gender issues into the response.

The *HIV/AIDS Management and Prevention Act 2003* ('HAMP Act') provides a legal framework for addressing HIV and human rights.

The *National AIDS Council Act* was passed in 1997. It establishes the National AIDS Council (NAC) as a separate statutory body, with a Secretariat. Its objects are —

- (a) to take multi sectoral approaches with a view to prevent, control and to eliminate transmission of HIV in Papua New Guinea; and
- (b) to organise measures to minimize the personal, social and economic impact of HIV infection and the disease of AIDS; and
- (c) to ensure, as far as is possible, that personal privacy, dignity and integrity are maintained in the face of the HIV/AIDS epidemic in Papua New Guinea, in accordance with the *Constitution* and the Global Strategy on AIDS.

NAC has lead agency responsibility, including responsibility for law review and development. Responsibility for health matters remains with the Department of Health. The Council's work is supplemented by that of a Parliamentary Special Committee on HIV and AIDS. Ministerial responsibility is located with the Minister for Health and HIV.

Twenty Provincial AIDS Committees have been established under the National AIDS Council, although these vary in their capacity to function, and in some provinces lack community representation and support from local government.

NAC policies include the 100% condom use policy and 100% safe blood supply policy. The NAC has also considered decriminalisation of sex work, although no moves have been made yet on this.

Government is three tiered, with national government, 19 provincial governments plus the National Capital District Commission, and several hundred local-level governments. Funding at lower levels is uneven and often inadequate. Coordination and cooperation between governmental bodies can be weak.

Civil society is represented predominantly by international NGOs, with in-country NGOs consisting mainly of sporting, environmental and church bodies. A coalition of companies has formed Business Against HIV/AIDS (BAHA) to coordinate the business sector response.

The Government has adopted a policy of mainstreaming HIV, which entails consideration of the management of HIV in every aspect of the core business of government. Program responses have been developed in key public sector agencies including the Correctional Services, Ministry of Education, Ministry of Social Welfare and Development, private industry including the mining sector and the Trade Union Congress. A national HIV/AIDS Workplace Policy was launched in July 2006,<sup>7</sup> and there is an HIV/AIDS Policy for the National Education System.

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<sup>7</sup> Peter, Agnes. 'Workplace policy on HIV/AIDS set' *The National* PNG (online) Tuesday July 25, 2006

# CHECKLIST 1 – PUBLIC HEALTH LAW

## 1. Does the legislation empower public health authorities to provide the following comprehensive prevention and treatment services:

- **Information and education**
- **Voluntary testing and counselling**
- **STD, sexual and reproductive health services**
- **Access to means of prevention e.g. condoms and clean injecting equipment**
- **Access to HIV medication, including ART, treatment for opportunistic infections, and medication for pain prophylaxis?**

The National AIDS Council Secretariat and National Department of Health coordinate treatment and prevention programs.

The *Public Health Act* is a pre-Independence statute in need of revision and reform, but this has not yet happened. It contains outdated provisions for management of listed ‘venereal diseases’. The provisions relating to infectious disease and ‘venereal disease’ in the *Public Health Act* (Chapter 226), and quarantine diseases in the *Quarantine Act* (Chapter 234), have been explicitly displaced by provisions in the HAMP Act (Section 3).

The HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection without reasonable excuse. This has a wide range of applications, from provision of condoms and HIV awareness materials to means of disinfection of sharps in prison, to provision of PEP.

The *Constitution* of the Autonomous Bougainville Government declares at Section 31 that the government shall make the fight against HIV/AIDS and its threat to the clans and to the future of Bougainville a major priority.

## 2. Does the legislation

- **Require specific informed consent, with pre- and post-test counselling to be obtained from individuals before they are tested for HIV in circumstances where they will be given the results of the test (i.e. not unlinked, sentinel surveillance)?**
- **Provide that if there are any exceptions to individual testing with informed consent, such testing can only be performed with judicial authorization?**

The HAMP Act requires informed consent except in emergency situations where the person is unable to give consent and the test is clinically necessary (Section 14) or by court order (Section 23(4)). All testing is to be with voluntary informed consent (Section 14). “Voluntary informed consent”, in relation to an HIV test, is defined by Section 12 to mean consent specifically related to the performance of an HIV test, freely given, without threat, coercion, duress, fraudulent means or undue influence, after provision of “pre-test information” and with the reasonable expectation of post-test support. Pre-test information, in relation to an HIV test, includes information about –

- (a) the nature of HIV and of AIDS; and
- (b) the nature and purpose of an HIV test; and
- (c) the testing process and the probable time-frame for obtaining test results; and
- (d) the legal and social consequences, including the possibility of notifying sexual partners, of having an HIV test and being infected with HIV; and
- (e) the ways to prevent transmission of HIV.

Mandatory screening, or the requirement to undergo an HIV test, produce an HIV certificate or answer questions tending to discover whether a person is a member of a stigmatised group, is also forbidden. This includes situations of employment, immigration, school admission and accommodation (Section 9).

Since 2007 PNG Government HIV testing policy endorses provider initiated counselling and testing (PICT), consistent with WHO/UNAIDS 2007 *Guidance on Provider-Initiated HIV Testing and Counselling in Health Facilities*. This Guidance requires a lower level of information and support for people tested compared to the Voluntary Counselling and Testing model. Under the PICT model, the more extensive pre-test counselling used in VCCT services is adapted to simply ensure informed consent, without a full education and counselling session. Minimum Standards for HIV/AIDS Services and Activities in PNG call for people to be tested at every entry point to the health care system: antenatal and STI clinics, paediatric clinics, TB clinics and outpatient clinics. There is a concern that in practice implementation of the PICT approach may breach HAMP requirements for pre-test information and post test support.

**3. Does the legislation only authorise the restriction of liberty/detention of persons living with HIV on grounds relating to their behaviour of exposing others to a real risk of transmission (i.e. not casual modes, such as using public transport), as opposed to their mere HIV status?**

Section 25 HAMP Act relates to reckless behaviour as opposed to HIV status.

**Does the legislation provide in such cases the following due process protections:**

- **Reasonable notice of case to the individual;** The case for imposing restrictions must be outlined by notice (see below).
- **Rights of review/appeal against adverse decisions;** Unclear, although there may be rights of appeal against a notice through administrative law, and against a conviction for breach of notice although these rights are not specified in the HAMP Act. The *District Courts Act 1963* grants a right of appeal to a person aggrieved by a decision of the District Court to appeal to the National Court from the conviction, order or adjudication
- **Fixed periods of duration of restrictive orders (i.e. not indefinite); No**  
There is a broad power to make orders that the Director considers are necessary or convenient to ensure an appropriate change of behaviour, the duration of these orders is not limited.
- **Right of legal representation? No**

The HAMP Act Sections 25 and 27 make it an offence to disobey a notice requiring a person to desist from reckless behaviour. The notice may restrict liberty (e.g. freedom of movement) if necessary to ensure an appropriate change of behaviour. The notice may be issued if it is believed, on reasonable grounds, that a person –

- (a) is and is aware of being infected with HIV; and
- (b) has behaved in such a way as to expose others to a significant risk of infection; and
- (c) is likely to continue that behaviour in future; and
- (d) has been counselled without success in achieving appropriate behaviour change; and
- (e) presents a real danger of infection to others.

Breach of the notice is an offence which may be punished by a prison sentence of up to 3 years. There is no right to legal representation. Notice provided to the person must state –

- (a) the grounds upon which the Director believes that it should be issued; and
- (b) the reasons why the person should not continue the behaviour; and
- (c) a direction that the person should not continue the behaviour, or should commence to behave in a specific manner; and
- (d) any other matters or directions that the Director considers are necessary or convenient to ensure an appropriate change of behaviour; and
- (e) that breach of a direction in the notice is an unlawful act, and may be dealt with according to this Act.

**4. Does the legislation authorise health-care professionals to notify sexual partners of their patients' HIV status in accordance with the following criteria:**

- **Counselling of the HIV-positive patient has failed to achieve appropriate behaviour change; Yes**
- **The HIV-positive patient has refused to notify or consent to notification of the partner; Yes**
- **A real risk of HIV transmission to the partner exists; Yes**
- **The identity of the HIV-positive partner is concealed from the partner where this is possible; Yes**
- **Necessary follow-up support is provided to those involved? No**

The HAMP Act Section 20 makes specific provision for partner notification. At counselling, positive people are urged to inform partners. In situations of refusal, a person providing treatment, care or counselling are enabled but not required to notify partners (Section 20), provided that:

- (i) counselling of the infected person has failed to achieve appropriate behavioural change; and
- (ii) the infected person has refused to notify, or consent to the notification of, the sexual partner; and
- (iii) there is a real risk of transmission of HIV by the infected person to the sexual partner. The HAMP Act does not provide a requirement for follow up support.

**5. Does the legislation provide for protection of the blood, tissue, and organ supply against HIV contamination (i.e. requiring HIV testing of all components)?**

Yes. Safety of the blood supply, and organ and tissue donation, is ensured by provisions inserted in the *Public Health Act* in 2003.

## CHECKLIST 2 – CRIMINAL LAW

- 1. Does the law provide for the legal operation of needle and syringe exchange? Are intermediaries (e.g. clients who distribute to third parties) covered by such protection, and is the evidentiary use of needles and syringes with trace elements of illegal drugs restricted (e.g. immunity for contents of approved disposal containers).**

No. Injecting drug use is not considered a factor in the PNG epidemic. The *National Narcotics Control Board Act 1992* established the Board. The Act enables licensing of addicts and the establishment of detoxification and rehabilitation programmes. The Board's main work to date has been with marijuana.

- 2. Does the law allow the following sexual acts between consenting adults in private:**

- **Homosexual acts e.g. sodomy;**

No. The *Criminal Code* (Sections 210, 212) retains the offences of sodomy and indecent dealings between males. Amendments in 2002 altered the language used in these provisions but did not abolish the offences. The HAMP Act 2003 provides that any communication relating to the sexual behaviour of a person made by another person undergoing an HIV test, a surgical or dental procedure or counselling under this Act is not admissible in any proceedings under Sections 210 and 212 of the Criminal Code Act 1974 or Sections 55 and 56 of the Summary Offences Act 1977.

- **Fornication or adultery;**

No. The *Adultery and Enticement Act 1988* makes adultery unlawful.

- **Street sex work, brothel or escort sex work?**

In 1975, the PNG Law Reform Commission recommended the decriminalisation of prostitution with the exclusion of any offence of soliciting in the *Summary Offences Act 1977*. However, prostitution is still illegal (at least where there is a course of conduct, rather than an isolated incident). In 1978 the courts determined that the Summary Offences Act offence of 'living on the earnings of prostitution' applies to the prostitute (*Anna Wemay and Others. v. Kepas Tumdual and Others* [1978] PNGLR 173). This interpretation is at odds with other common-law jurisdictions, where the provision is used only against those living on the earnings of the prostitution of others. This interpretation was not applied in a subsequent PNG case of receiving money for an isolated prostitution association, which was held not to constitute living, even partly, off earnings.

Although prosecutions are rare, the illegality gives police a basis for harassment of both female and male sex workers. Enactment of legislation that implements the 1975 Law Reform Commission recommendations of decriminalisation of soliciting while retaining the offences of brothel-keeping and living off the earnings of others would provide a pragmatic solution that would bring PNG law into line with the *International Guidelines*.

**3. If sex work is prohibited, or there are prostitution-related offences, is there any exception for HIV prevention and care services (e.g. evidentiary immunity for carrying condoms)?**

There is no evidentiary immunity for carrying condoms or other legal protections relating to HIV prevention and sexual health promotion work with sex workers. There are reports of police harassment of HIV peer education workers and sex worker action groups.<sup>8</sup>

**4. Does the legislation regulate occupational health and safety in the sex industry to require safer sex practices to be:**

- Practised by clients;
- Practiced by workers; and
- Promoted by owners/managers (including prohibiting the requirement of unsafe sex)?

There is no legislation regulating health and safety in the sex industry. Sex work in PNG is generally not brothel based.

**5. Does the legislation protect sex workers, including children, from coercion and trafficking? Is the object of such protection the removal and support of such workers, rather than criminalizing their behaviour as opposed to those responsible (i.e. owners or intermediaries)?**

*Criminal Code 1974* Section 218 makes it an offence to procure entice or lead away any girl or woman so that some person may have carnal knowledge with her either inside or outside Papua New Guinea. In some circumstances traffickers may be subject to prosecution for living off the earnings of prostitution.

The *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* amended the Criminal Code to protect children from sexual abuse and commercial sexual exploitation, including child prostitution. For the purposes of control of child prostitution, a child is defined as a person under the age of eighteen years. The Act criminalises both persons purveying or allowing child prostitution, and persons who are clients of a child prostitute.

Rights-based child protection legislation, the *Lukautim Pikinini Act (Child Protection Act) 2007* enables children to demand the right to protection.

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<sup>8</sup> C Jenkins (2000) *Female Sex Worker HIV Prevention Projects: lessons learned from Papua New Guinea, India and Bangladesh*, UNAIDS Best Practice Collection, Geneva.

**6. Does the law provide for general, rather than specific, offences for the deliberate or intentional transmission of HIV?**

The HAMP Act provides that transmission or attempted transmission of HIV is an assault or attempted assault occasioning bodily harm under the *Criminal Code*. Where death has already occurred, it is an act of unlawful killing, and the year and a day rule is displaced. It is a defence to a charge that the other person was aware of the risk and voluntarily accepted it; that the other person was already infected; or that a condom was used if the transmission was through sexual intercourse (Section 23 HAMP Act).

Reckless behaviour in someone infected should be discouraged by counselling and, if necessary, written notice from the Director (Section 25). Breach of a notice is an offence which can be punished by imprisonment.

## CHECKLIST 3 – PRISONS/CORRECTIONAL LAWS

**1. Does the legislation provide for access equal to the outside community to the following HIV-related prevention and care services in prisons or correctional facilities:**

- **Information and education**
- **Voluntary counselling and testing**
- **Means of prevention e.g. condoms, bleach, and clean injecting equipment**
- **Treatment – ART and treatment for opportunistic infections**
- **Choice to participate in clinical trials (if available)?**

The Constitution provides that all persons deprived of their liberty "shall be treated with humanity and with respect for the inherent dignity of the human person".

There is no statutory right to access services in prison that are equal to those available in the outside community. In practice, condoms and ARVs are not available to prisoners. However the HAMP Act Section 11 provides that people including prisoners have a right to access means of prevention including condoms and means of disinfecting sharps.

The *Correctional Service HIV/AIDS Strategy* includes policies on discrimination, universal health precautions for staff and voluntary testing for detainees, information and education programs for staff, detainees and surrounding communities. The Strategy aims to “uphold the human rights of those people infected and affected by HIV/AIDS and other infectious diseases”. The HIV Strategy states that “preventive measures for HIV will be based on the risk behaviours occurring in prisons and will be complementary to, and compatible with, those in the community” and requires that “if available, condoms will be provided to detainees on leave of absence programs and release.”

The *Correctional Services Act 1995* provides that as soon as possible after the reception of a detainee into a correctional institution, the detainee shall submit to medical tests including blood tests; at any time after the reception of a detainee into a correctional institution, the medical officer may direct the detainee to submit to medical tests. Section 9 of the HAMP Act provides that it is unlawful to require or coerce a detainee or person in custody to submit to an HIV test. As the HAMP Act was enacted in 2003, it is likely to take precedence over the *Correctional Services Act 1995*. The HAMP Act’s requirements for informed consent and counselling apply to detainees.

The *Correctional Services Regulations* provide that the prison medical officer shall daily see all sick detainees.

Human Rights Watch investigations in 2006 revealed police use of violence, including sexual violence, against individuals in custody. Reception centres for processing children have begun operating in the Port Moresby and Lae police stations. Police are reported to have detained children with adults in police lockups, where they are denied medical care

and placed at risk of rape and other forms of violence. In prisons and other juvenile institutions, children awaiting trial are mixed with those already convicted. Many facilities lack blankets, beds, mosquito nets, clothes, or any education program.<sup>9</sup>

Intravenous drug use is not an issue in PNG prisons, but cannabis use is reportedly high.

**2. Does the legislation provide for the protection of prisoners from involuntary acts that may transmit the virus, e.g. rape, sexual violence, or coercion?**

Section 152 of the *Correctional Services Act* provides that assault and malicious threats are prison offences.

**3. Does the legislation provide for the confidentiality of prisoners' medical and/or personal information, including HIV status?**

Clause 67(2) of the *Correctional Service Regulations* provides that a Commanding Officer shall ensure that the reception process of medically examining the detainee is conducted with regard to the detainee's privacy and self respect. The HAMP Act imposes obligations of confidentiality on medical officers and other staff involved in care of prisoners living with HIV, being "a person is providing an HIV testing, treatment, care, counselling, or associated health care service" (Section 18).

**4. Does the legislation not require segregation of prisoners, merely on the basis of their HIV status, as opposed to behaviour?**

Clause of 112 the *Correctional Services Regulations* provide that the medical officer of a correctional institution shall see and examine every detainee in that correctional institution as soon as possible after his admission and thereafter as necessary, with a view particularly to—

- (a) the discovery of physical or mental illness and the taking of all necessary measures in connection therewith; and
- (b) the segregation of detainees suspected of infectious or contagious conditions.

Where the medical officer believes or suspects that a person in a correctional institution is suffering from an infectious disease, he shall immediately—

- (a) notify the Commissioner and the Departmental Head of the Department responsible for health matters; and
- (b) take, or cause or direct to be taken, all necessary measures to protect persons in the institution against the disease; and
- (c) supervise the carrying out of the measures or cause them to be supervised

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<sup>9</sup> Human Rights Watch, *Human Rights Watch World Report 2007 - Papua New Guinea*, 11 January 2007. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/45aca2a425.html>

It is not known whether HIV is considered an infectious disease for the purpose of the *Regulations*.

**5. Does the legislation (e.g. sentencing) provide for medical conditions, such as AIDS, as grounds for compassionate early release or diversion to alternatives other than incarceration?**

Sentencing is generally discretionary and ill health may be taken into account as a mitigating factor on a case by case basis. There is a discretion at common law to take AIDS into account in mitigation when deciding a prison sentence if imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk that imprisonment will have a gravely adverse effect on the offender's health (see e.g. *PP v Lim Kim Hock* [1998] SGHC 274; *Bailey v DPP* (1988) 78 ALR. 116; *R v Bernard* [1997] 1 Cr App R (S) 135).

The *Correctional Services Regulations* provide that the prison medical officer report to the Commanding Officer whenever he considers that a detainee's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment. Where the medical officer is of the opinion that the life of a detainee is endangered by his detention in a correctional institution; or a sick detainee may not survive his sentence; or a detainee is unfit for detention in a correctional institution he shall report his opinion in writing to the Commissioner.

The *Correctional Services Act* provides that a person is serving a term of imprisonment the Minister may, if he thinks proper to do so in the circumstances, grant to him, by writing under his hand, a licence to be at large.

**6. Does the legislation provide for non-discriminatory access to facilities and privileges for HIV-positive prisoners?**

Under the HAMP Act discrimination on the grounds of a person's HIV status is unlawful in relation to detainees and persons in custody in –

- (i) the application of detention, restriction or segregation procedures or conditions; or
- (ii) the provision of and access to health facilities and care; or
- (iii) the subjecting of a detainee to any other detriment in relation to detention or custody.

## CHECKLIST 4 – ANTIDISCRIMINATION LEGISLATION

### 1. Does the legislation provide for protection against discrimination on the ground of disability, widely defined to include HIV/AIDS?

There is no general disability discrimination legislation in PNG.

### 2. Does the legislation provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV/AIDS e.g. gender, homosexuality?

The HAMP Act Part II makes discrimination against a person infected or affected by HIV unlawful in a wide range of situations, including discriminatory treatment of prisoners and people in custody, and in relation to employment. A "person infected or affected by HIV/AIDS" is defined as a person who—

- is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or
- has had, is having, is seeking to have or has refused to have an HIV test; or
- is related to or is associated with a person who is, or is presumed to be, infected by HIV or has, or is presumed to have, AIDS; or
- is, or is presumed to be, a member of or associated with a group, activity or occupation, or living in an environment, which is commonly associated with, or presumed to be associated with, infection by, or transmission of, HIV (Section 2).

This makes discrimination against some marginalised but currently criminalised persons such as sex workers unlawful in some circumstances.

The *Constitution of the Bougainville Autonomous Government* provides at Article 30 that the right of persons with disabilities to respect and human dignity shall be recognized and protected.

#### **Does the legislation contain the following substantive features:**

- **Coverage of direct and indirect discrimination**

The HAMP Act covers direct discrimination. There is no specific provision making indirect discrimination unlawful. Discrimination is not defined by the HAMP Act. Therefore the position is ambiguous and requires clarification.

- **Coverage of those presumed to be infected, as well as carers, partners, family or associates**

Yes. See above.

- **Coverage of vilification**

Vilification is covered by provisions of the HAMP Act that make stigmatisation unlawful (Section 10).

- **The ground complained of only needs to be one of several reasons for the discriminatory act**

The HAMP Act Section 6 states that the ground complained of may be one of several reasons, and need not be the dominant or substantial reason for the discrimination.

- **Narrow exemptions and exceptions (e.g. superannuation and life insurance on the basis of reasonable actuarial data)**

HAMP Act exceptions are narrow in relation to:

- (i) Superannuation and insurance; and
- (ii) Actions which are for the special benefit, assistance, welfare, protection or advancement of a person or group.

The exception in the HAMP Act Section 6(3) that “it is not unlawful to discriminate against a person on the ground of infection by HIV or having AIDS if the discrimination is no more detrimental than discrimination on the ground of having another life-threatening medical condition” is unnecessarily broad. This exception may mean that blanket discrimination against all people with life threatening conditions is lawful, even if unreasonable.

- **Wide jurisdiction in the public and private sectors (e.g. health care, employment, education, and accommodation)**

The HAMP Act has wide application in public and private sectors including health care, employment, education, and accommodation (Section 7). The Ombudsman Commission has limited capacity to consider complaints in relation to discrimination in the private sector. The *Constitution* does not specifically state that the Commission’s jurisdiction extends to consideration of the actions of private individuals. Under the *Organic Law on the Ombudsman Commission* the only action open to the Ombudsman Commission in relation to complaints about private sector individuals and organisations is to refer matters to the Public Prosecutor. Therefore court action is required in order to pursue a complaint against a private sector entity.

### **3. Does the legislation provide for the following administrative features:**

- **Independence of a complaint body;**
- **Representative complaints (e.g. public interest organizations on behalf of individuals)**
- **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill;**
- **Access to free legal assistance;**

- **Investigatory powers to address systemic discrimination;**
- **Confidentiality protections e.g. use of pseudonyms in reporting of cases?**

### **Independence of a complaint body**

The Ombudsman Commission has been given powers to investigate breaches of the HAMP Act under its anti-discrimination jurisdiction. Section 219(1)(c) of the Constitution, which provides that it may investigate, either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice within the meaning of a law prohibiting such practices.

The Ombudsman Commission has established a Human Rights Desk.

Under Part XIV of the *Constitution* of the Bougainville Autonomous Government, human rights are enforceable in the Bougainville High Court, as well as the national Supreme and National Courts, in the same way as they are enforceable under the National *Constitution*. In addition, damages may be awarded to a person whose rights have been infringed. Customary methods of dealing with abuses of rights should be utilized wherever possible. Provision is made for the establishment of a human rights enforcement body.

### **Representative complaints (e.g. public interest organizations on behalf of individuals)**

HAMP Act Section 27 provides that action in respect of an unlawful act may be taken by any person who has an interest in the unlawful act complained of, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his right under this section, by a person acting on his behalf, whether or not by his authority. There is no specific provision for organizations to represent individuals but Section 27 may allow this if the organization is incorporated and can demonstrate a sufficient interest in the unlawful act complained of.

### **Speedy redress e.g. guaranteed processing of cases within a reasonable period, or fast-tracking of cases where the complainant is terminally ill; Access to free legal assistance**

This is not specifically addressed by the HAMP Act or other legislation. The Ombudsman Commission has limited reach throughout PNG, can only provide very limited assistance to private sector complainants and can provide limited remedies for public sector complainants. It cannot grant compensation.

National and District Courts also have jurisdiction to grant relief under the HAMP Act including compensation for loss or damage and a declaration that the act was unlawful. National and District Courts are difficult to access particularly in rural areas.

Amending the Act to grant direct but limited jurisdiction to the village courts would make some of the rights and protections created by the HAMP Act more accessible to the general

population, particularly in the areas of stigmatisation, and discrimination in provision of accommodation, and, access to goods, services, or public facilities.<sup>10</sup>

Access to legal aid is not specifically addressed by the HAMP Act or other legislation.

### **Investigatory powers to address systemic discrimination**

This is not specifically addressed by the HAMP Act. The Ombudsman Commission is able to report to Parliament or other authorities on systemic issues as a result of an investigation into an act of discrimination.

### **Confidentiality protections e.g. use of pseudonyms in reporting of cases**

Sections 18 and 19 of the HAMP Act provide comprehensive confidentiality and privacy protections relating to administration of complaints and court proceedings under the Act.

#### **4. Does the legislation provide for the institution administering the legislation (e.g. human rights commission or ombudsperson) to have the following functions:**

- **Education and promotion of human rights;**
- **Advising government on human rights issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on its activities?**

Legislation does not give the Ombudsman Commission powers relating to education but as a matter of practice the Commission conducts education and public awareness through its external relations program and provides advice to leaders and other persons on the proper discharge of functions. Section 219 of the *Constitution* and the *Organic Law on the Ombudsman Commission* define the Commission's powers of investigation.

The *Constitution* limits the Commission's powers of enforcement to publicity for its proceedings, reports and recommendations, to the making of reports and recommendations to the Parliament and other appropriate authorities as provided by an Organic Law, and to the giving of advice. The Commission does not have conciliation and arbitration powers. The Commission reports on activities through annual reports and publication of the outcome of investigation of complaints.

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<sup>10</sup> G Howse. Accessing Rights and Protections Under The *HIV/AIDS Management And Prevention Act* in Papua New Guinea: Making a Case For Granting A Limited Jurisdiction to The Village Courts *Journal of South Pacific Law* (2008) 12(1)

## CHECKLIST 5 – EQUALITY OF LEGAL STATUS OF VULNERABLE POPULATIONS

1. Does the law ensure the equal legal status of men and women in the following areas:

- **Ownership of property and inheritance;**
- **Marital relations e.g. divorce and custody ;**
- **Capacity to enter into contracts, mortgages, credit and finance;**
- **Access to reproductive and STD health information and services;**
- **Protection from sexual and other violence, including rape in marriage;**
- **Recognition of de facto relationships;**
- **Prohibition of harmful traditional practices e.g. female genital mutilation?**

The *Constitution* Section 55 guarantees all citizens the same rights, privileges, obligations and duties irrespective of sex, although this does not affect pre-Independence law. Citizens have the right to the full protection of the law (*Constitution* Part III.3) However, freedom from discrimination is not a guaranteed right. Schedule 2.1(1) of the *Constitution* provides that Customary law is part of the ‘underlying law’ of Papua New Guinea.

Part XIV of the *Constitution of the Autonomous Bougainville Government* provides for a system of human rights whereby the rights in the National *Constitution* are applied in Bougainville.

### **Ownership of property, inheritance and capacity to enter into contracts, mortgages, credit and finance**

As there is no legal guarantee of non-discrimination on the grounds of sex, women can be discriminated against in access to mortgages, credit and finance. Consumer protection legislation may offer some limited protection where conduct is considered unfair or resulting in denial of right to choice of products.

Women do not enjoy equality in relation to the ownership and disposition of property because land tenure is often based on custom leaving men in control of most aspects of land and property.

The *Wills, Probate and Administration Act* 1966 provides equality for men and women in inheritance. However, the Act does not apply to customary land, which is based instead on patrilineal lines. Customary law in respect of land can discriminate against women as long as it not repugnant to humanity, does not result in injustice or is contrary to the interests of a child under 16.

Customary law has constitutional legal status. This means that customs relating to inheritance and property ownership that favour men are effectively preserved. Although

there are some limits on customary law, in the absence of a constitutional guarantee that equality between men and women takes precedence over customary law, women have limited recourse against discriminatory practices. Schedule 2.1(1) of the *Constitution* provides that customary law is part of the 'underlying law' of Papua New Guinea. This is subject to the provisos that customary law cannot be inconsistent with the *Constitution* or with statute and is not valid if inappropriate to conditions of country. The *Customs Recognition Act* 1963 provides that customary law is not recognised if it results in injustice or is contrary to public interests or is contrary to the best interests of a child under 16.

### **Marital relations e.g. divorce and custody and recognition of de facto relationships**

Section 3 of the *Marriage Act* (Chapter 280) recognizes both statutory (registered) and customary marriages. Polygamy is legal where customary. Most, but not all, customs require payment of a brideprice.

In *Re Willingal* (1997) N 1506, the Court refused to accept a custom whereby an unwilling woman was to be given in marriage as part of a complicated compensation settlement between two kin groups. A custom of this sort was in breach of section 55 of the *Constitution*.

There is not equality in marital relations. The minimum age for marriage is 18 for males and 16 for females. Divorce in PNG is based on fault based criteria (including adultery, desertion and cruelty: *Matrimonial Causes Act 1963*). Women may become trapped in violent relationships if they do not proceed with divorce for fear of violent reprisals if they give evidence to prove their husband's cruelty and adultery.

Part VII of the *Matrimonial Causes Act 1963* addresses property and custody upon separation.

PNG has adopted the standard of the best interests of the child as the paramount consideration in custody disputes after separation and divorce. Customary laws regarding custody however favour men. The general customary law principle is that brideprice brings entitlement to children. This is recognized by the Courts.

The division of property is based on what is 'just and equitable', which fails to provide clear criteria for judges. Such criterion may not include adequate consideration of women's unpaid contributions to the household including care of dependents. PNG provides for maintenance orders during separation and after divorce for both children and spouses. The basis on which maintenance is provided is left largely to the discretion of the court with the broad criteria of the 'means, earning capacity and conduct' of the parties. A married woman having separate property is subject to the same liability for the maintenance of her children as the husband is subject to for the maintenance of her children (*Married Women's Property Act 1953*).

*De facto* partners are not spouses at law although there may be difficulty involved in distinguishing a valid customary marriage from a *de facto* relationship.

### **Access to reproductive and STD health information services**

HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection of himself or another, without reasonable excuse. This gives women and men the right to access male and female condoms. Under the Act “means of protection” includes –

- (a) HIV/AIDS awareness materials; and
- (b) condoms, condom lubricant and any other means of prevention of HIV transmission.

There is no statutory basis for rights of access reproductive health services. Abortion is illegal under Sections 225-226 of the *Criminal Code*.

### **Protection from sexual violence, including rape in marriage**

The *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* introduced a new sexual assault regime into the Criminal Code. Offences cover all forms of abuse and are graded on the basis of seriousness to the victim. Substantial penalties apply. The 2002 Criminal Code amendments rendered rape gender-neutral and provided for rape within marriage, by amending Section 347.

#### **2. Does the legislation prohibit the mandatory testing of targeted or vulnerable groups, such as orphans, the poor, sex workers, minorities, indigenous populations, migrants, refugees, internally displaced persons, people with disabilities, men who have sex with men, and injecting drug users?**

Section 9 of the HAMP Act prohibits requiring or coercing a person to be tested for HIV in relation to employment or contract work; prisons and other places of detention; partnerships; membership of an industrial or professional organization, club sporting association or other association; education; accommodation including rental, hotel and guesthouse accommodation; the provision of or access to goods, services or public facilities; adoption or marriage; or entry into, residence in or citizenship of the country.

#### **3. Does the law require children to be provided with age-appropriate information, education and means of prevention?**

Section 11 of the HAMP Act states the right to access HIV awareness materials and other “means of protection” against HIV such as condoms, which must be provide unless there is a reasonable excuse.

#### **4. Does the law enable children and adolescents to be involved in decision-making in line with their evolving capacities in regard to:**

- **Consent to voluntary testing with pre- and post-test counselling;**
- **Access to confidential sexual and reproductive health services?**

The HAMP Act Section 14(2) recognises children's and young people's right to consent to testing. The informed consent of a child aged 13 or more is required prior to an HIV test. A child's parent or guardian can consent if the person to be tested is aged 12 years or less and is, in the opinion of the person providing the pre-test information, not capable of understanding the meaning and consequences of an HIV test.

The HAMP Act Section 18 recognises the right to confidentiality of HIV test results of children aged 13 or more. The child's consent is required to release of confidential information to family or others. If the child is aged 12 or less then the parent or guardian can consent to release of confidential information.

**5. Does the law provide protection for children against sexual abuse and exploitation? Is the object of such legislation the rehabilitation and support of survivors, rather than further victimizing them by subjecting them to penalties?**

The *Criminal Code (Sexual Offences and Crimes Against Children) Act 2002* provides protection for children from sexual abuse.

**6. Does the law provide an equal age of consent for heterosexual and homosexual acts? Does the law recognize same-sex marriages or domestic relationships?**

Homosexual acts are illegal. Same sex relationships have no legal recognition.

## CHECKLIST 6 – PRIVACY/CONFIDENTIALITY LAWS

- 1. Does the legislation provide for general privacy or confidentiality protection for medical and/or personal information, widely defined to include HIV-related data? 2. Does the legislation prohibit unauthorised use and disclosure of such data?**

The *Constitution* Section 49 provides—

Every person has the right to reasonable privacy in respect of his private and family life, his communications with other persons and his personal papers and effects, except to the extent that the exercise of that right is regulated or restricted by a law that complies with Section 38.

Courts have held that this right extends to medical records: *S.C.R. No.2 of 1984; Re Medical Privilege* [1985] PNGLR 247.

International human rights law suggests that the human right to respect for private life extends to protection of people living with HIV from having their confidential medical records disclosed without consent. See e.g. *I v Finland* [2008] ECHR 20511/03 (17 July 2008) in which the European Court of Human Rights held that the measures taken by a hospital to safeguard the right to respect for private life of an HIV-positive patient of the hospital were inadequate and in violation of Article 8 (the right to respect for private life) of the *European Convention on Human Rights*.

The HAMP Act requires that any person who comes into possession of information regarding a person's HIV status should take all steps to preserve confidentiality. A test result should only be given to the person to whom it relates.

- 3 Does the legislation provide for the subject of the information to have access to his or her own records and the right to require that the data are: Accurate; Relevant; Complete; Up-to-date?**

There is no legislative requirement for a person to have access to his or her own records and the right to require that the data are accurate, relevant, complete and updated.

- 4 Does the legislation provide for the independent agency administering the legislation (e.g. privacy or data protection commissioner) to have the following functions:**

- **Education and promotion of privacy;**
- **Advising government on privacy issues;**
- **Monitoring compliance with domestic legislation and international treaties and norms;**
- **Investigating, conciliating, resolving or arbitrating individual complaints;**
- **Keeping data/statistics of cases and reporting on activities?**

There is no legislation establishing a privacy or data protection commissioner. The Ombudsman Commission has functions in relation to investigation of complaints in respect of Constitutional rights including privacy and can advise government on recommendations resulting from an investigation.

**5 Does other general or public health legislation provide for the right of HIV-positive people to have their privacy and/or identity protected in legal proceedings (e.g. closed hearings and/or use of pseudonyms)?**

Section 37(12) of the *Constitution* requires trials to be held in public, but Subsection 13 provides for laws to enable courts to exclude persons from proceedings in the interests of public welfare or in circumstances where publicity would prejudice the interests of justice, the welfare of minors or the protection of the private lives of those concerned in the proceedings. The HAMP Act Section 19 enables such closure where the person to whom the HIV information relates requests it, or the court considers that the information should not be publicly disclosed because of the social, psychological or economic consequences to the person to whom the information relates. This closure extends to the publication of reports of the proceedings, other than law reports.

**6 . Does public health legislation provide for reporting of HIV/AIDS cases to public health authorities for epidemiological purposes with adequate privacy protections (e.g. coded rather than nominal data)?**

Section 18 of the HAMP Act provides that information on HIV status gained in the course of surveillance can be disclosed where the information is statistical only or cannot otherwise reasonably be expected to lead to the identification of the person to whom it relates.

## CHECKLIST 7 – EMPLOYMENT LAWS

- 1. Does the legislation prohibit HIV screening for general employment purposes, e.g. employment, promotion, training, and benefits?**

Yes, the HAMP Act prohibits requiring or coercing an HIV test for employment purposes.

- 2. Does the legislation prohibit mandatory testing of specific employment groups, e.g. military, transport workers, hospitality/tourist industry workers, and sex workers?**

Employment groups are not specified by the HAMP Act.

- 3. Does the legislation require implementation of universal infection control measures, including training and provision of equipment in all settings involving exposure to blood/body fluids, e.g. first aid, and health care work?**

To encourage infection control, the HAMP Act Section 32 provides a defence to prosecution under the Act if infection control guidelines issued by the National Department of Health have been followed. However, there is no requirement that the guidelines promote or require a “universal” infection control approach.

- 4. Does the legislation require provision of access to information and education about HIV/AIDS for occupational health and safety reasons, e.g. workers travelling in areas of high incidence?**

There is no specific obligation to provide HIV information and education for occupational health and safety reasons. There is a general obligation to provide access to means of protection from HIV including awareness materials in the HAMP Act.

- 5. Does the law provide for:**

- 1. Employment security while HIV-positive workers are able to work (e.g. unfair dismissal rules); and**
- 2. Social security and other benefits where workers are no longer able to work?**

The anti-discrimination provisions of the HAMP Act provide employment security while people living with HIV are at work. There is no social security legislation for unemployment or disability support. *Employment Act 1978* requires employers to provide sick leave to employees. For employees who have contributed to superannuation schemes, disability benefits are payable for permanent incapacity under schemes operating under the *Superannuation Act 2000*.

**6. Does the law provide for confidentiality of employees' medical and personal information including HIV status?**

Although there is a constitutional guarantee of privacy, there was no information available at the time of writing to indicate whether it has been invoked in this context.

The HAMP Act provisions relating to confidentiality place an obligation of confidentiality on those involved in providing treatment, care and counselling of a person living with HIV, but not on employers.

**7. Does workers' compensation legislation recognize occupational transmission of HIV?**

There are no specific provisions in the *Workers Compensation Act 1978* or regulations relating to HIV. A workplace injury that involved HIV transmission would be dealt with under the general provisions of the Act. Section 41 provides that proceedings for the recovery of compensation are not maintainable unless—

- (a) notice of the injury has been given as soon as practicable after the injury occurs and before the worker has voluntarily left the employment in which he was injured; and
- (b) the claim for compensation with respect to the injury has been made within 12 months after the occurrence of the injury.

This may disqualify claims for HIV if diagnosis occurs more than 12 months after the occupational transmission.

## CHECKLIST 8 – THERAPEUTIC GOODS, CONSUMER PROTECTION LAWS

**1. Does the legislation regulate the quality, accuracy, and availability of HIV test kits (including rapid home test kits, if approved)?**

Section 31 HAMP Act provides that the Minister may approve a type or class of HIV test kit for use in the country. An approval may include conditions as to use. A person who manufactures, imports, sells, distributes, supplies, uses or authorises the use of or otherwise deals with an HIV test kit that is not an approved HIV test kit, or contrary to any condition of approval for its use, is guilty of an offence. Any HIV test kit in respect of which a person is convicted of an offence is forfeited to the State and shall be disposed of as the Director directs.

**2. Does the legislation provide for approval only to be given for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices if they are:**

- Safe; and
- Efficacious?

Section 14 of the *Medicines and Cosmetics Act* requires pharmaceuticals, vaccines and medical devices to conform to such standards as are prescribed. The standards prescribed by regulation relate to safety and efficacy.

**3. Does the legislation provide consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices?**

The *Medicines and Cosmetics Act 1999* Section 19 protects consumers against false or misleading claims in respect of drugs, vaccines, and medical devices.

**4. Does the legislation regulate the quality of condoms? Does such regulation include monitoring compliance with the International Condom Standard?**

A condom is a medical device for the purposes of the *Medicines and Cosmetics Act 1999*. No information was available as to whether compliance with the International Condom Standard is required or monitored.

**5. Does the legislation ensure the accessibility and free availability of the following prevention measures:**

- Condoms
- Bleach
- Needles and syringes?

Legislation does not provide an absolute guarantee of access or free availability. However the HAMP Act by Section 11 makes it unlawful to deny a person access to a means of protection from HIV infection of himself or another, without reasonable excuse. Under the Act “means of protection” includes –

- (a) HIV/AIDS awareness materials;
- (b) condoms, condom lubricant and any other means of prevention of HIV transmission;
- (c) exclusive personal use of skin penetrative instruments, including razors, needles and syringes; and
- (d) means of disinfecting skin penetrative instruments.

**6. Does the legislation enable consumers to gain access to affordable HIV/AIDS medication (for example, through the mechanisms of parallel importing or compulsory licensing of pharmaceutical products, inclusion of HIV-related medication in subsidization schemes for certain pharmaceuticals, and lack of duties/customs or tax)?**

Section 20 of the *Value Added Tax Act 1998* provides that the supply of prescription drugs prescribed by a registered medical practitioner is exempt from VAT.

Patent legislation provides for compulsory licensing (including government use), which enables a compulsory license to be issued to import generic versions of patented medicines if required. However, there are no parallel importing provisions, so importing of brand name medicines that are available more cheaply in other countries is not provided for.

PNG is a member of the World Trade Organization. The *Patent and Industrial Designs Act 2000* provides protection for an invention which also includes improvements to an invention which may be a product or process. An invention must be new, involve an inventive step and must be industrially applicable.

PNG became a member state of the Patent Cooperation Treaty in 2003 which is an international filing system. The patents office (IPOPNG) accepts national applications (applications which are sought through the national system) and PCT (Patent Cooperation Treaty) applications (applications which are sought through the international PCT system).

The Act provides protection for any invention which is an idea of an inventor which provides a solution to a specific problem in the field of technology and maybe a product or a process. After being granted a patent in Papua New Guinea, the protection lasts for 20 years from the date of initial filing. After 20 years, the invention enters the public domain and the protection for the invention is not renewable.

The protection of the patent is within Papua New Guinea and protects the patented invention from persons other than the owner from infringement.

Compulsory licensing is provided for government use, in case of national interests such as national security, health, or a national emergency. If the Government decides to exploit a patent, the owner including stake holders are paid remuneration.

Parallel importing is not addressed by the legislation. The Act incorporates national exhaustion of rights. This limits the circulation of products covered by patents in one country to only those put on the market by the patent owner or its authorized agents in that same country.

## **CHECKLIST 9 – ETHICAL HUMAN RESEARCH**

- 1. Does the law provide for legal protection for human subjects in HIV/AIDS research? Does the legislation require the establishment of ethical review committees to ensure independent, ongoing evaluation of research? Do the criteria used in such evaluation include the scientific validity and ethical conduct of research?**

The HAMP Act at Section 30 requires that all HIV-related research must first obtain the approval of the National AIDS Council. The National AIDS Council Research Advisory Committee has developed guidelines for approval of research that require ethical review and consideration of the merit of proposed research.

The visa approval process also imposes requirements for ethical review. The National Research Institute liaises with other national institutions, and technical review committees, where necessary, to effect project approval and appropriate research affiliation before recommending the approval of a research visa. Similarly, medical research visa applications are vetted by the PNG Medical Research Advisory Council.

For clinical research, the Medical Society recommends that the principles laid out by the World Medical Association be followed. These include conformity to the moral and scientific principles that justify medical research; careful assessment of inherent risk; the subject's freely given consent should be obtained after full explanation of the nature, purpose and risks of the research has been given, and consent may be withdrawn at any time; personal integrity of the subject should be safeguarded.

- 2. Does the legislation require subjects to be provided before, during and after participation with:**
  - **Counselling**
  - **Protection from discrimination;**
  - **Health and support services?**

There are no specific legislative requirements.

- 3. Does the legislation provide for informed consent to be obtained from the subjects?**

No, but ethics committees will require informed consent.

- 4. Does the legislation provide for confidentiality of personal information obtained in the process of research?**

Yes, HAMP Act Section 18 requires a researcher to take all reasonable steps to prevent disclosure of HIV or AIDS status of a research subject to any other person.

**5. Does the legislation provide for subjects to be guaranteed equitable access to the information and benefits of research?**

No, although this may be considered in the ethics committee review process.

**6. Does the legislation provide for non-discriminatory selection of subjects?**

No, although this may be considered in the ethics committee review process.

## CHECKLIST 10 – ASSOCIATION, INFORMATION, CODES OF PRACTICE

**1. Does the law enable the unrestricted movement of people because of their membership of vulnerable groups, e.g. sex workers?**

The Constitution provides that citizens have the right to freedom of movement. This may be difficult to enforce in practice particularly for populations who are marginalised such as women or whose behaviours are criminalised such as sex workers and men who have sex with men.

**2. Does the legislation enable the unrestricted association of members of vulnerable groups e.g. gay men?**

The Constitution provides that citizens have the right to freedom of assembly and association. This may be difficult to enforce in practice, particularly in the case of associations of men who have sex with men and sex workers, given that sodomy and soliciting remain crimes.

**3. Does censorship legislation contain exceptions for general and targeted HIV/AIDS information?**

The application of censorship legislation (*Classification of Publications (Censorship) Act 1988*), the prohibited imports provisions of the *Customs Act*, the obscene and indecent matter provisions of Section 228 of the *Criminal Code* and the indecent articles provisions of the *Summary Offences Act* to HIV/AIDS awareness materials is excluded by Section 3 of the HAMP Act. Condoms and condom lubricant are not obscene or indecent objects for the purposes of the *Criminal Code* or *Summary Offences Act*.

**4. Do broadcasting standards contain exceptions for general and targeted HIV/AIDS education and information?**

No broadcasting standards were identified that address HIV.

**5. Does the law require the following professional groups to develop and enforce appropriate HIV/AIDS Codes of Practice:**

- Health care workers
- Other industries where there may be a risk of transmission, e.g. sex or funeral workers;
- Media;
- Superannuation and insurance;
- Employers (in a tripartite forum involving unions and government)?

The HAMP Act mandates the development, by National Department of Health, of Infection Control Guidelines. Other professional groups are not required by legislation to have Codes of Practice relating to HIV. A national *HIV/AIDS Workplace Policy* was launched in 2006.

**6. Are such Codes of Practice required to contain the following elements:**

- **Confidentiality/privacy protections;**
- **Informed consent to HIV testing;**
- **Duty not to unfairly discriminate; and**
- **Duty to minimize risk of transmission, e.g. occupational health and safety standards including universal infection control precautions?**

There are no specific legislative requirements.

## SUMMARY AND RECOMMENDATIONS

The rights based approach introduced by the HAMP Act could be strengthened by reform to criminal laws.

### **Criminal law and corrections**

The following matters in the criminal law have not been addressed—

- the continued criminalisation of prostitution
- the continued criminalisation of abortion
- the sodomy law and the law on indecent dealings between males, which marginalise men who have sex with men.

The offences related to male-male sex and prostitution involving consenting adults in private contravene human rights and undermine HIV and STI prevention and care efforts. The offence of abortion contravenes the rights of women and girls to make their own reproductive choices as noted in the International Guidelines. To encourage honest discussion of sexual behaviours the adultery offence should be removed.

Legal protections are required for health promotion work with sex workers. Evidentiary immunity should be allowed for carrying condoms. Peer educators should not be subject to risk of prosecution.

Condoms and ARVs should be required to be made available to prisoners under the *Correctional Services Regulations*. Legislation should clarify that HIV is not an infectious disease for the purpose of the *Correctional Services Act* and regulations.

### **HAMP Act**

The HAMP Act was designed to take account of the rights in the *Constitution*, human rights generally and the principles in the International Guidelines. The HAMP Act is progressive legislation that affords important protections to people living with and affected by HIV and contributes to setting an enabling environment for HIV prevention and care. Ongoing efforts to educate communities and the legal and medical professions about rights and responsibilities under the Act are important.

The Act could be strengthened in a number of areas.

The HAMP Act must be accessible and enforceable so that the law can provide the protections intended by Parliament. Legislation that clarifies the jurisdiction of Village Courts to hear complaints under the HAMP Act would assist HIV affected populations across the country to access human rights protections.

The HAMP Act provisions relating to discrimination could be strengthened by:

- defining discrimination to include indirect discrimination
- removing the defence that allows discrimination on the ground of HIV if other medical conditions are treated similarly. The HAMP Act defence that states that

“it is not unlawful to discriminate against a person ...if the discrimination is no more detrimental than discrimination on the ground of having another life threatening medical condition” should be removed, or qualified so that the defence is only available where discrimination on the ground of having another life threatening medical condition is reasonable taking into account the impacts on people living with life threatening conditions and the public interest.

HAMP Act protections against discrimination in the private sector require strengthening. The body receiving complaints under the HAMP Act should be able to address discrimination by private sector entities. The Ombudsman commission is currently not able to perform this function.

The HAMP Act could be strengthened by amendments to clarify that representative or class action complaints can be made by public interest organizations on behalf of individuals or a defined class of individuals.

HAMP Act Section 25 should be amended to require fixed periods of duration of restrictive orders (i.e. not indefinite).

The implementation of the provider-initiated testing and counselling (PICT) approach to HIV testing in health facilities requires active monitoring to ensure that HAMP Act requirements for pre-test information and post test support are met.

Legislation should require “universal” infection control approaches in health care settings.

Unlinked anonymous HIV surveillance testing is prohibited by the HAMP Act as informed consent is not obtained. There is a public interest in obtaining more reliable data on HIV prevalence which is likely to be assisted by unlinked anonymous HIV surveillance testing. Counter to this runs the ethical argument of the problem of detecting positive results and not being able to offer care and counselling to the person to whom the result relates. These arguments require community debate.

### **Other legislation**

Legislation should clarify that aspects of customary law that discriminate against women including in relation to property, inheritance and custody of children should not be enforceable.

The introduction of general anti-discrimination legislation covering discrimination on the grounds of disability, sex, sexuality and transgender status would improve the environment for HIV prevention and care.

Legislation should require that condoms comply with international quality standards.

The *Patents and Industrial Designs Act* should be amended to recognise international exhaustion of patents, thereby enabling parallel importing of medicines. In anticipation of

PNG increasing its capacity to assess and approve drugs for marketing, the Act should also include an 'early working' exception through including a 'bolar' provision, so that generic medicines can be registered domestically and approved for marketing as soon as possible after patent expiry.

Legal recognition should be give to de facto relationships including same sex partnerships. This would assist HIV prevention efforts by improving the status of women (e.g. by providing rights to property and maintenance after separation) and reducing the social marginalisation of men who have sex with men.

Legislation should enable persons to have access to their own medical records.